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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-610

NORTHEAST MASTER EXECUTIVE COUNCIL,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
DELTA AIR LINES, INC.,
DELTA MASTER EXECUTIVE COUNCIL,
Respondents.

BRIEF FOR RESPONDENT DELTA AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Delta Air Lines, Inc. (Delta) disagrees with the petitioner's statement of question presented [1] and therefore restates it as follows:

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[1] Delta is not aware that the integrated seniority list was "uniformly repudiated by the rank and file pilot members of the absorbed airline," as the petitioner states in its question. Delta also takes issue with the statement that the list systematically favors the pilots of the surviving carrier.

Whether the Court of Appeals erred in affirming an order of the Civil Aeronautics Board dismissing the petition of certain airline pilots requesting the CAB to exercise its reserved jurisdiction in connection with an integrated seniority list required by the CAB as a condition to its approval of an airline merger, where there were no allegations of bad faith and the list was compiled in accordance with traditional procedures of the CAB and the involved union.

STATUTE INVOLVED

Although not cited by the petitioner, this case involves the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, and particularly 49 U.S.C. § 1378, pursuant to which the Civil Aeronautics Board (CAB or Board) is vested with jurisdiction over airline mergers.

STATEMENT OF THE CASE

Petitioner's statement of the case, while generally accurate, contains several incorrect statements and omits several pertinent points. Rather than restating the case, Delta calls the Court's attention to the excellent statement of the case in the opinion of the Court of Appeals, a copy of which is attached to the petition (see Appendix A to the petition, beginning at p. 1a) and Delta's Statement of the case in its Brief in Opposition in the companion cases *(Carey, et al.* v. *O'Donnell, et al.* and *Chaudoin, et al.* v. *Air Line Pilots Association, et al.)* which are the subject of a petition for writ of certiorari in case No. 74-608.

Additionally, Delta points out two inaccurate statements of the petitioner, both of which are found on page 3 of the petition. The first is that "all Delta pilots and not one Northeast pilot will reach the eventual seniority he would have had absent a merger." The seniority lists of the two companies were integrated primarily on the

basis of the length of service of the pilots of each company, as modified by the ratio of Delta pilots to Northeast pilots, subject to certain equipment restrictions (*i.e.*, restrictions on the type of aircraft which may be flown by certain pilots over certain periods of time). The petitioner has not and cannot show by any reliable evidence that under the integrated seniority list the Northeast pilots were deprived of any rights, benefits or emoluments arising from seniority which they would have had absent the merger.

The second inaccurate statement reads, "The cumulative effect of such a list, coupled with equipment restrictions, meant that none of the Northeast pilots would be able to participate in flying larger aircraft and in the emoluments that go with such an opportunity." As petitioner must know, former Northeast pilots are today flying DC-8's—which are aircraft larger than any flown or owned by Northeast Airlines—and by the end of 1976, every large aircraft in the Delta fleet will be available for flying by former Northeast pilots.

REASONS FOR DENYING THE WRIT

As in case No. 74-608, there is no basis for granting a writ of certiorari in this case because the petitioner clearly has not shown the case to be within the Court's guidelines for granting writs of certiorari. There is no conflict in the cases of the Circuit Courts of Appeals and there is no unusual question calling for the attention of this Court. The principles involved are all well-settled.

Petitioner states that:

> "[a]t a time when airline mergers are in the offing . . . labor, management and the Board will benefit from guidelines established by this Court in defining the scope of the CAB's reserved jurisdiction." (Petition at page 5)

Petitioner goes on to state that there is an unresolved question as to:

> "whether or not union procedures that effectively undermine participation by rank and file members in seniority integration can be challenged before the Board in the exercise of its reserved jurisdiction when the chosen representatives of the employees are grossly indifferent, and even hostile, to the interests they have been appointed to protect." (Petition at page 6)

There are, in fact, no unresolved questions with respect to the scope of the CAB's reserved jurisdiction as related to this case. The CAB repeatedly has followed established precedents with respect to disputes involving seniority integration and the scope of its reserved jurisdiction and its actions have been affirmed by the Courts. Those precedents were followed again in this case and the petitioner merely is dissatisfied with the result.

The petitioner's statement that a still unresolved question exists with respect to whether seniority integration may be challenged before the Board on the basis of hostile discrimination by representatives of employees is grossly misleading and incorrect. The statement implies (without saying) that the representatives of the Northeast pilots in this case were hostile to the employees whom they represented, *while the petitioner never alleged before the Board (or the Court of Appeals) that there was any such hostile conduct, bad faith or similar irregularity.* Moreover, the Board's policy of exercising reserved jurisdiction in cases of bad faith is clearly broad enough to include matters such as hostile discrimination (even though allegations of such conduct were not before the Board in this case).[2] Accordingly, petitioner has not set out any sound basis for the grant of a writ of certiorari and the petition should be denied.

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[2] See, *e.g., North Atlantic Route Transfer Case,* 12 CAB 124, 133 (1959).

ARGUMENT

There is no dispute concerning the material facts in this case. All parties agree that the integrated seniority list was negotiated by two representatives from each pilot group in accordance with the ALPA merger procedure and, despite the veiled implication of hostile conduct raised for the first time in this Court, there has never been any direct allegation (much less proof) that the Northeast pilot representatives acted in bad faith, that they participated in any fraudulent conduct or that they otherwise sought to undermine the interests of those whom they represented. (The CAB so held and the petitioner has not challenged that finding. See Appendix A to the Petition, p. 26a.)

To the contrary, it is clear that the pilot representatives negotiated in good faith to reach a settlement of a most difficult problem. The petitioning MEC apparently is dissatified *only* because the Northeast pilot representatives did not insist upon an integrated list based *solely* upon length of service, even though the ALPA procedure selected by the pilots provided that other factors could be considered.[3]

Before the CAB the petitioner relied primarily on the contention that the integrated list was not fair and equitable because it was not based upon length of service and on the contention that the ALPA merger policy had not been followed, alleging certain "irregularities" (falling short of bad faith) such as the secrecy of the negotiations.[4]

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[3] The CAB noted that the Northeast MEC (petitioner herein) had instructed the Northeast representatives to insist on length of service only, notwithstanding that the ALPA procedure provided otherwise. See Appendix A to the Petition, p. 23a.

[4] In stating the issues in the Court of Appeals, the petitioner admitted there was an absence of "a showing of bad faith." See page 2 of petitioner's Brief in the Court of Appeals (No. 73-1595).

In the Court of Appeals petitioner abandoned its argument that the ALPA merger policy had not been followed and in so concluding the Court of Appeals noted the statement in the petitioner's brief with respect to "procedural irregularities that fall short of directly violating . . . ALPA Merger Policy." [5]

The Court then dealt with the argument concerning the MEC's insistence on length of service as the sole criteria for the integration of the seniority lists:

> "Petitioner next argues that by failing to follow its instructions to seek a merged list based solely upon length of service, the merger representative[s] exceeded the scope of their authority. But the simple answer to this is that ALPA merger policy on the method to be used is to the contrary, and there was nothing that either the merger representatives or the MEC could have done to change it." (Appendix A to the Petition, p. 10a)

Thus it is clear that the representatives of the Northeast pilots followed the duly established policy of ALPA, the bargaining representative of all of the pilots involved. That the result of the negotiations is valid, even though it may displease some of the pilots represented, is supported by one of the cases primarily relied upon by the petitioner in this Court. In *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953), a unanimous Court said:

> "Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.
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> * * * *

[5] See Appendix A to the Petition, p. 9a.

"The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents. . . . Inevitable differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. *The complete satisfaction of all who are represented is hardly to be expected.* A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

"Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. . . . Seniority rules . . . may, in the first instance, revolve around the length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences. . . ." [emphasis added]

The final point dealt with by the Court of Appeals below was whether the integrated list had been arrived at "in a fair and equitable manner". The court concluded that the CAB's provision for negotiation of the integration by the parties most concerned (*i.e.*, the pilots themselves) was indeed fair and equitable, relying upon the principles set out in *Outland* v. *CAB*, 109 U.S. App. D.C. 90, 284 F.2d 224 (D.C. Cir. 1960). (See footnote 36 on page 12a of Appendix to the Petition.)

The *Outland* case arose from a fact situation which was virtually identical to the instant case. Because it is directly in point and dispositive of this case, Judge (now Chief Justice) Burger's opinion is quoted at some length as follows:

"[3] *The contention that length of service should control or even that it should always be the dominant factor in seniority is not consistent with expe-*

rience nor with judicial attitudes toward the subject. See Flying Tiger-Slick Merger Case, 18 C.A.B. 326, 330 (1954); Ford Motor Co. v. Huffman, 1953, 345 U.S. 330, 338-339, 73 S.Ct. 681, 97 L.Ed. 1048. *Seniority is a matter of negotiation in the first instance and when confronted with the problem, the courts have recognized that factors other than time in service are also important. No general rules can or need be laid down.* One difficulty with having length of service be the sole criterion in the context of airlines mergers is seen in the case of one airline, which uses only conventional propeller equipment, merging with another using a large amount of jet and jet propeller equipment. Seniority based only on length of service might conflict with safety regulations which require special experience for jet equipment. *Of necessity the process of integrating two or more seniority lists calls for compromises in the process of negotiating a result. Here, as we have pointed out, the majority group had the same representation as the minority who now challenge the result. By its very nature the process of integrating the two seniority lists can sometimes lead to consequences unfavorable to some.*

"[4, 5] *The Board's original directive to merge the seniority lists was reasonable and proper and the processes of negotiation were adapted to accomplish an appropriate result. In the Board's view its directive was satisfied when the affected parties negotiated and agreed on a solution.* The Board's interpretation of the meaning of its own order and the scope of its own functions is entitled to great weight particularly where that interpretation is consistent with common experience in these matters. Danielson v. Civil Aeronautics Board, 2 Cir., 1953, 204 F. 2d 266; see Bowles v. Seminole Rock & Sand Co., 1945, 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700." [emphasis added]

The *Outland* case is undoubtedly a correct application of the relevant principles and it is controlling here.[6]

All of its arguments having been cogently disposed of by the Court of Appeals, the petitioner now attempts to inject a "fair representation" issue into the case in order to create an "important issue" for this Court's review. Apparently reluctant to make an unsupportable direct statement, the petitioner merely implies that the representatives of Northeast were hostile to their fellow pilots. (See page 6 of the Petition.) This issue, however, even if it were properly before the Court, has been decided by the courts and there is no unresolved question with respect thereto.

As Delta points out in its brief in the companion *Carey* and *Chaudoin* cases (No. 74-608), the question of fair representation has been raised in a number of cases related to seniority integration in airline mergers and it has been decided that all such questions are for the CAB to determine under its exclusive jurisdiction. *Oling* v. *Air Line Pilots Ass'n*, 346 F.2d 279 (7th Cir. 1965), *cert. den'd*, 382 U.S. 926 (1965); *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973); *Hyland* v. *United Air Lines, Inc.*, 254 F.Supp. 367 (N.D. Ill. 1966). See also pages 5-9 of Delta's brief in No. 74-608.

It is clear then that the fair representation issue is not an unresolved important question with respect to the scope of the CAB's reserved jurisdiction. Clearly, the CAB can consider all arguments put forward with respect to the validity of a seniority list, including argu-

[6] The statement in *Outland* that the Board's directive to integrate seniority lists in a fair and equitable manner "was not the usual practice in merger cases" was correct at the time, but since that language was inserted in the CAB's labor protective provisions in the *Delta-C&S Merger Case*, it has uniformly appeared in the labor protective provisions in every subsequent merger approved by the Board. See, *e.g.*, the *United-Capital Merger Case*, 40 CAB 903 (1964).

ments with respect to "fair representation." The Board's "bad faith" standard is certainly broad enough to include any fair representation issue. In this case, however, the petitioner has conceded that there was no bad faith. This being so, there is absolutely no basis for review by this Court.

CONCLUSION

No important or unresolved questions are raised by the petitioner and for this reason Delta prays that this Court will not issue a writ of certiorari in the above case.

Respectfully submitted,

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